United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7210

In The

United States Court of Appeals

For the Second Circuit

EULA LEE BLOWERS, et al., PATRICIA LOUGHNEY, et al., MARY NAGEOTTE, et al.,

Plaintiffs-Appellants,

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Applicant for Intervention-Appellant,

vs.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY, et al.,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

Authorities

Cases:

Treatises:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 75 - 7210, 7211,
7212, 7215

Eula Lee Blowers, et al.
Patricia Loughney, et al.
Mary Nageotte, et al.

Plaintiffs-Appellants,

United States Equal Employment
Opportunity Commission,

Applicant for Intervention-Appellant,

-vs-

The Lawyers Co-operative Publishing
Company, et al.

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BRIEF OF DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal from an unreported opinion and order of the United States District Court for the Western District of New York, entered by the Honorable Harold P. Burke, District Judge, on February 24, 1975, which denied the United States Equal Employment Opportunities Commission's (hereafter "EEOC") motion

to intervene. The EEOC had sought to intervene in a consolidated employment discrimination action brought by eleven present or former employees of defendant-appellants (hereafter collectively referred to as "LCP") and the National Organization for Women (N.O.W.).

Although it is not relevant in any way to this appeal, LCP must answer the allegations set forth in appellants' brief that LCP has intentionally delayed the prosecution of these actions solely to harass plaintiffs. LCP has done no more than protect the legitimate interests of its employees and itself. It has consistently followed the Federal Rules of Discovery. It has made many offers to allow plaintiffs' access to records which would be useful to plaintiffs' actions (and it did so over two years ago, e.g. R. 70-72).*

Moreover, LCP has urged the Court below to decide the class action issue. In preparing the record for this appeal, LCP urged that most of the material appellants (including the EEOC) sought to include in the Appendix was not only irrelevant to this appeal, but also would delay the Court's decision on the class action issue. Plaintiffs' attorney, however, insisted that the material go into the Appendix, in the face of LCP's objections and with the

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* "R." References are to the joint appendix.

knowledge that further delay would be caused thereby. (See, letter of Burke, J. attached hereto as Exhibit "A").

ISSUE PRESENTED

Did the Court below abuse its discretion in denying the EEOC's motion to intervene?

FACTS

Plaintiff Blowers filed her action on January 29, 1973, on behalf of herself and all others similarly situated, alleging sex discrimination in employment. Plaintiffs Loughney et al. and N.O.W. filed their actions on May 14, 1973. The Nageotte action was filed on July 12, 1973.

Defendants served their first interrogatories on February 22, 1973, and depositions of plaintiff began on March 14, 1973.

Discovery motions were heard by this Court on April 9, 1973, April 23, 1973, and March 11, 1974. The parties submitted extensive memoranda and briefs to the Court with respect to the discovery motions pending before the Court.

On April 27, 1973, the EEOC requested leave to file a brief amicus curiae in support of plaintiff Blowers' contention that this action should proceed as a class action.

On March 11, 1974, LCP pointed out that it had no objection to the consolidation of the three lawsuits (R.131).

On May 20, 1974, the first day of class action hearings was held before the Court below. An EEOC staff attorney was specially admitted to practice before the Court, and assisted plaintiff's counsel at the hearing.

On July 9, 1974, a pretrial conference was held before the Court below with counsel for the parties present.

On September 20, 1974, the second day of class action hearings was held before the Court below. Again, an EEOC attorney was admitted specially to appear with plaintiff's counsel, assisted plaintiff's counsel, and was permitted to address the Court with reference to the class action issue.

At the close of the class action hearing on September 20, 1974, plaintiff's counsel informed the Court below that she had presented her case, and that no further hearings were required. Plaintiff's counsel further stated that she would file her brief in support of plaintiff's purported class two weeks after receipt of the hearing transcript. Since the hearing transcript was certified and delivered by the Court Reporter on October 26, 1974, plaintiff's brief should have been due November 8, 1974, and defendants' brief due on November 22, 1974.

Nonetheless, on October 21, 1974, the EEOC moved to intervene in this action, as a party, relying upon the permissive joinder provisions of FRCP 24(b).

At the same time, the EEOC, by letter dated October 21,

1974, asked this Court to further delay this lawsuit by requesting that the Court not decide the class action question until the EEOC could have the opportunity to participate as a party. (See Exhibit "B" attached hereto) In support of its application to intervene, the EEOC filed a notice of motion, a motion to intervene, a memorandum of points and authorities in support of its motion to intervene, and an intervenor's complaint (which raised no issues not already set forth in plaintiffs' complaints).

Upon the proceedings below, the intervenor's complaint, the papers in support and in opposition thereto, and upon appearances for the parties before the Court, Judge Burke, in an exercise of his discretion, denied the motion to intervene. (R.254-256)

Since that time, some ten (10) days of deposition of LCP's Vice-President-Personnel have taken place. Moreover, there has been extensive production of documents and further offers by LCP to produce documents, all of which have, to date, been ignored by plaintiffs.

POINT 1

THE APPEAL OF PLAINTIFFS-APPELLANTS SHOULD BE DISMISSED.

The order appealed from did no more than dismiss the EEOC's motion to intervene. The order made no disposition of any

plaintiffs' motions or their complaints. Plaintiffs have no standing on this appeal, and LCP can find no authority for plaintiffs' appeal, and urge that it be dismissed. See, 9 Moore's Federal Practice, ¶110.13[7], at 131, 132 (2d Ed. 1973).

Moreover, even if plaintiffs have some imagined interest in the denial of the EEOC's motion, since the EEOC is appealing the Court below's order, plaintiffs' appeal is entirely redundant and must be dismissed.

POINT II

THE DISTRICT COURT APPLIED THE PROPER AND CORRECT STANDARDS IN DENYING THE COMMISSION'S MOTION TO INTERVENE.

The proposed intervenor's complaint, submitted by the EEOC to this Court, sets forth no new allegations and seeks no relief beyond that requested by plaintiffs. No rights or interests other than those represented by plaintiffs will be protected by the addition of the EEOC as a party. Intervention should therefore be denied. Patterson v. Youngstown Sheet & Tube Company, 62 F.R.D. 351 (N.D. Ind. 1974); Kinsey v. Legg, Mason & Co., 62 F.R.D. 462 (D.D.C. 1974).

In its brief, however, the EEOC argues that Rule 24(b) should be virtually ignored to allow intervention by a government agency seeking to protect the public interest. In support of

this contention, the EEOC cites Neusse v. Camp, 385 F.2d 694 (D.C. Cir. 1967). In particular, the EEOC asserts that the proper standard for EEOC intervention would be to always grant intervention to the EEOC unless there are compelling circumstances justifying a denial thereof. These arguments by the EEOC are without foundation in law, and should be rejected in their entirety.

It is clear that the cases relied upon by the EEOC do not support its claim that intervention should be granted absent compelling reasons for a denial. In fact, even in Neusse v. Camp, supra, the court did not endorse the standard urged by the EEOC. Quite to the contrary, the court in Neusse v. Camp did not go any further than determining that a government official may be permitted to intervene on behalf of the public interest. In reaching this decision the Court specifically stated, at p. 706, that:

> "Notwithstanding this public interest the official may be denied intervention in the exercise of a sound judicial discretion finding that the intervention would unduly expand the controversy or otherwise lead to the improvident delay or expense. No such exercise of discretion is involved here. Intervention was denied, on the authority of Judge Knet's ruling, solely because of lack of appropriate interest. That was error."

It is clear from the holding in this case that the same standards are applied in deciding a motion filed under Rule 24(b) by a

government agency as they would be if the motion were filed by a private party.

Moreover, upon the EEOC's brief, it is manifest that its position must be rejected. The EEOC argues that if it determines that a case is one of "general public importance," in its sole bureaucratic discretion, the District Court should not exercise its discretion under FRCP 24(b). It is clear that Congress, in the 1972 Amendments to Title VII, did not give the EEOC the right to intervene in a private action [FRCP 24(a)], but limited the EEOC to permissive intervention, [FRCP (b)].

The EEOC now seeks to short-circuit the intent of Congress. It argues that:

(1) The EEOC has the unreviewable and unilateral right to decide whether a case is one of "general public importance" (EEOC Brief, p.20).**

** Although defendants do not contest the right of the EEOC to run its internal affairs as it, in its expert opinion, deems proper, the EEOC's certification of this case as one of "general public importance" further underscores the EEOC's harassment of defendants. The defendant company employs less than 1100 people. It is one of the smaller Rochester employers and is not publicly held. It is difficult to imagine that its employment practices warrant the characterization of "general public importance".

(2) If the EEOC decides that a case is one of "general public importance," a District Court is prohibited from the exercise of the discretion vested in it by FRCP 24(b).

(3) Therefore, the EEOC would have this Court remove any meaningful judicial discretion once the EEOC determines, within the confines of its own bureaucracy, that a case is of general public importance, since the "public importance" question is unreviewable (so it contends).

It has been repeatedly held that a motion to intervene by the EEOC is to be judged against the general standards of delay, prejudice, adequacy of representation and trial convenience. Sinyard v. Foote & Davis, _____ F. Supp. _____, 8 F.E.P. Cases 477 (D.C. Ga. 1974), aff'd, 502 F.2d 783 (5th Cir. 1974); Kinsey v. Legg, Mason & Co., Inc., 62 F.R.D. 462 (D.C.D.C. 1974); Patterson v. Youngston Sheet & Tube Company, 62 F.R.D. 351 (N.D. Ind., 1974).

For example, in Sinyard v. Foote & Davis, supra, an action affirmed by the Fifth Circuit, the EEOC moved to intervene in a sex discrimination suit. The motion was denied. Specifically, the District Court held, at p. 478, that:

> "Thus, the only factor for consideration is whether intervention will unduly delay adjudication of the issues in this action. We feel that it would. This action has been pending in this court for nearly twenty months, and during that time, very little progress towards the ultimate resolution of the issues presented has been made. The bulk of this time has been spent on discovery disputes between the parties and yet discovery has not been fully completed. It is anticipated that if the EEOC were to intervene a new set of discovery suits would arise. Although the EEOC contends that defendants need not conduct discovery against it because information in its own files has been accessible to them since the litigation began, the EEOC has made no indication that it would forbear from initiating discovery against the three defendants. The Court has no intention to preside over another year of discovery disputes before trying this case.
>
> Notwithstanding the above, the court feels that the EEOC has a substantial interest in this action which could be fully protected by the filing of amicus briefs on the various motions that may be raised herein." 8 FEP Cases 477, 478.

Upon appeal, the Fifth Circuit affirmed this decision.

The facts in Sinyard are quite similar to the facts in the case at bar. Very little progress has been made in the Blowers action toward the ultimate resolution of the issues since the actions were filed in 1973. Most of the time has instead been taken up by discovery disputes and discovery proceedings. In this action, as in Sinyard, the EEOC has not shown any indication that it will forbear from initiating future discovery

against defendant, although it has said that it will accept past discovery. It is, therefore, assuredly probable that EEOC's intervention as a party litigant will further delay this case through the initiation of new sets of discovery disputes. Moreover, since the EEOC files have not been available to LCP, LCP would require discovery of the EEOC. Finally, it is clear from the facts of the instant case that, just as in Sinyard, the EEOC has participated as amicus curiae, and has been heard fully both on oral arguments and by way of briefs filed with the Court throughout this litigation. Under these circumstances, the District Court did not abuse its discretion by denying the EEOC motion to intervene, since it has always permitted the EEOC to assist plaintiffs' counsel (who denies the need for such help).

It is furthermore clear from the decisions by a number of district courts that intervention has been denied to the EEOC upon the same grounds as it was denied by the court below in this action. Kinsey v. Legg, Mason & Co., Inc., supra; Patterson v. Youngston Sheet and Tube Co., supra; Love et al. v. Pullman Co., 7 E.P.D. ¶9300 (D.C. Col. 1973). Thus, in Kinsey v. Legg, Mason & Co., supra, a recent action of which the EEOC must have been aware at the time, but which it failed to mention to the Court below, an EEOC application to intervene was deemed to be untimely despite the EEOC's reliance upon the same arguments (and the same authority) that it presented to the Court below:

> The Commission has certified that this case is one of general public importance and the Court accepts, for the purposes of this motion, that characterization. The EEOC argues that its intervention is timely in that no substantive issues have been decided, despite the fact that this suit was filed July 7, 1971. The EEOC has pointed to two cases supporting its view of the timeliness of the intervention sought: Smith Petroleum Service, Inc. v. Monsanto Chemical Co., 420 F.2d 1103 (5th Cir. 1970), and Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir. 1972). It must be pointed out that both of these cases involved intervention as of right under Fed.R.Civ. P. 24(a), and that a different measure of timeliness is normally applied to permissive intervention. Cameron v. President and Fellows of Harvard College, 157 F.2d 993 (1st Cir. 1946); 3B Moore's Federal Practice, ¶2513[1]. Thus, "an assertion of a legal right to intervene might well be considered timely even when made at a relatively late stage of the main action whereas a request for leave to intervene in discretion made at the same stage in the main action might well be considered otherwise. 157 F.2d at 996."
> Kinsey v. Legg, Mason & Co., 62 F.R.D. 462, 463

Similarly in Love v. Pullman, supra, the Court carefully set out the rules on permissive intervention in denying the EEOC's motion to intervene, and specifically found that the EEOC had failed to satisfy the following criteria:

One, the EEOC had not made a timely application for leave to intervene. This standard of timeliness was judged, not by any eventual prejudice to the parties, but as a matter of trial convenience to be determined by the trial court.

Two, the EEOC had failed to file a certificate of general public importance.

Three, the EEOC's complaint did not raise any new issues nor did it reveal the likelihood that the Commission would contribute to the progress of the lawsuit as a party in any greater degree than it would as amicus curiae. With respect to this third criteria, the Court stated, at p. 7394, that:

> "Third, the participation of the applicant must not be likely to result in undue delay or prejudice to existing parties. Of course, delay is bound to occur whenever an additional party is permitted to intervene.... The question over whether such delay is undue or unwarranted, however, requires a close scrutiny of the compensating advantages, if any. We are convinced that while the Commission's tendered complaint does not vary so much from the plaintiffs' second amendment and first supplemental complaint or raise such new issues as to engender great delay, neither does it reveal the likelihood that the Commission would contribute to this lawsuit as a party in any greater degree than as amicus curiae. In such cases, permissive intervention should be denied. See 3B J. Moore, Federal Practice, ¶ 24.10(4) (2d Ed. 1969); Bumgarner v. Ute Indian Tribe, 417 F.2d 1305 (10th Cir. 1969). It is doubtless true that the Commission has both resources and expertise which would be of assistance to the plaintiffs in the prosecution of this action. We believe, however, that these would be no less available to the plaintiffs if the Commission were to participate in this suit in the role of amicus curiae. It is therefore ordered that the applicant's motion for leave to intervene must be, and the same hereby is, denied."

In this action, since there has already been extensive litigation of motions, depositions have begun (and are continuing), and the class action hearings have been closed,

EEOC intervention was not, and is not, timely. As Professor Moore states:

> But where there has been much litigation by way of motions, depositions and discovery, taking of testimony before a master, etc., tardy intervention will usually be denied. 3B Moore, Federal Practice ¶24.13[1] at 24-523 (2d Ed. 1974)

Even if the EEOC itself was unaware that plaintiff had filed this action in January, 1973, the EEOC did know of the action as early as April 27, 1973 (two and one-quarter years ago) when it filed a brief amicus curiae in this action. In considering a motion to intervene, the Second Circuit has noted that, even if the intervenor has the right to intervene (which is not the case here), a long delay should be considered in rejecting intervention:

> . . . he [the District Judge] acted well within the bounds of his discretion in determining that the application to intervene--made sixteen months later--was untimely. Allegheny Corporation v. Kirby, 344 F.2d 571, 574 (2d Cir. 1965)

However, as the Court noted in Smith Petroleum Service, Inc. v. Monsanto Chemical Co., 421 F.2d 1103 (5th Cir. 1970), an intervenor's delay may be excused if a reason for delay is given. Nonetheless, the EEOC offered no reasons to the Court below for its excessive delay in seeking intervention in this action. Now, upon appeal, the EEOC, in its brief, offers administrative

excuses for its failure. (EEOC Brief, p. 29-30). There is and was nothing, by way of evidence in the record, to support these self-serving assertions. However, if this case is one of "general public importance," as the EEOC now says it is, why did the EEOC not intervene earlier? Moreover, since the EEOC had the power to sue in its own name (at the time it issued the Blowers right to sue letter; R.19), why did it not pursue such an "important" case in its own name? (In fact, the EEOC never even investigated plaintiffs' charges; R.226, 414, 461). Certainly there have been no new issues added to this suit since it was filed.

By making its motion to intervene, the EEOC has already sought to delay this lawsuit. The EEOC asked the Court below to delay its decision on the class until it (the EEOC) may be able to "participate fully, should . . . (the Court) grant our motion, in the resolution of the class issue, with the complete right to appeal from an adverse ruling should that be necessary." (Letter of October 21, 1974 to the Court from the EEOC, attached hereto as Exhibit "B"). It has further delayed the action by demanding that the class action record be sent to the Second Circuit in New York, thereby delaying even longer the determination by the District Court of the class action issues.

If the EEOC seeks to file briefs either to this Court or upon some future appeal, presumably it could do so as amicus curiae. Therefore, intervention is unnecessary, since Judge Burke continued the EEOC's right to participate as amicus curiae.

However, the EEOC's letter to this Court must be taken to indicate it intends to do more than submit briefs. (Why else would intervention as a party, rather than an appearance amicus curiae, be necessary?)

It is clear that one of the following must be true:

(1) The EEOC seeks to obtain status as a party in an attempt to re-open the completed class action hearings;

or

(2) The EEOC lacks confidence in plaintiffs' ability to pursue a class action to the final resolution that the EEOC, in its "expert" opinion, believes proper.

If the first possibility is correct, the EEOC should not now be permitted to force defendants to re-litigate the class action issue or the other issues that have been heretofore fully presented to this Court, after sitting by, on the sidelines of this case, for over a year and a half. If the second possibility is correct, class action status for plaintiffs should be denied for lack of effective representation by counsel, and plaintiffs' cases should go forward on their individual merits.

Already, there have been extensive discovery motions in this action, supported by oral arguments and briefs. Presumably, since some of these motions are yet to be decided, the EEOC would have the right to submit further argument and briefs speaking to these motions, if it were allowed to intervene as a party. Certainly, this additional "round" of arguments and briefs would add

nothing to the extensive briefs already filed and would clearly delay trial of this consolidated action.

In addition to discovery motions, depositions of the plaintiffs have begun, and there has been at least one pretrial conference in this action, in addition to the two days of class action hearings.

It should be obvious that permission to add another party to this action, especially a Washington, D.C. party that does not have local counsel in Rochester, would only add to further delays of discovery and trial. It certainly will make all scheduling difficulties immensely more difficult. Even if scheduling and travel difficulties can be overcome, the additional presence of another party's counsel at depositions and document discovery can only add to the burden and costs to be incurred by the parties to this lawsuit.

CONCLUSION

The EEOC, by its own admission, does not raise any new issues in this action. The EEOC, for the first time in its brief to this Court, vaguely states that its expertise could be valuable to plaintiffs. All of its support could more easily be given as amicus curiae, without the delay inherent in the introduction of a new party. Moreover, since it raises no new issues, and it has stated that plaintiffs' counsel is fully competent to

handle this litigation, its extensive arguments that the public interest cannot be vindicated without its presence as a party are simply without substance. What public interest, not already set forth in plaintiffs' complaint would be vindicated if the EEOC were made a party?

Certainly neither the EEOC nor plaintiffs have established that the District Court abused its discretion.

Dated: June 27, 1975

Respectfully submitted,

John B. McCrory

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April 21, 1975

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James H. Morgenstern
Attorney at Law
Lincoln First Tower
Rochester, New York 14603

Re: Blowers et al vs. Lawyers Cooperative

You have submitted to me today the question whether the record on appeal from this court's order denying E.E.O.C.'s motion to intervene, should include the entire record of the two days of class action hearings.

I hold that it should. If this delays the decision on the class action motion, we must accept the delay.

HAROLD P. BURKE
U. S. District Judge

HPB:jem

"EXHIBIT A"

October 21, 1974

The Honorable Harold P. Burke
United States District Judge
272 U. S. Courthouse
Rochester, New York 14614

Re: Blowers v. Lawyer's Cooperative Publishing Company Inc. Civil Action No. 1973-47

Dear Judge Burke:

We have today filed with the Court Clerk in Buffalo the EEOC's Motion to Intervene in the above case. The Motion is noticed for hearing on November 11, 1974.

We are writing separately to urge that you consider ruling on our Motion to Intervene prior to issuing your order with respect to a class determination. By so ruling, you will permit the Commission to participate fully, should you grant our Motion, in the resolution of the class issue, with a complete right to appeal from an adverse ruling should that be necessary. Deferring a ruling on the Motion to Intervene, or limiting the Commission to its current status as amicus curiae, will severely hinder the Commission's participation in litigating the crucial issue of the class.

We respectfully request that you consider this application for an expedited ruling on the Commission's status.

Very truly yours,

Charlyn J. Buss

Barry J. Bennett
Trial Attorneys

cc: Emmelyn Logan-Baldwin, Esq.
John McCrory, Esq.

CC(L)CJBuss/10/21/74rp

"EXHIBIT B"

Affidavit of Service

Monroe County's
Business/Legal Daily Newspaper
Established 1908

11 Centre Park
Rochester, New York 14608
Correspondence: P.O. Box 6, 14601
(716) 232-6920

Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

June 30, 1975

Re: BLOWERS, ET AL vs LAWYERS COOPERATIVE PUBLISHING CO., ET AL

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Nixon, Hargrave, Devans and Doyle

Attorney(s) for

Defendants-Appellees

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix of the above entitled case addressed to:

Ms. Emmelyn S. Logan-Baldwin
510 Powers Building
Rochester, NY 14614

Mr. James P. Scanlon, Esq.
United States Equal Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☒ By hand delivery

.....John D. Hay.....

Sworn to before me this 30th day of June, 1975

.....

~~Notary Public~~
Commissioner of Deeds